



Bryan, Pendleton, Swats & McAllister, LLC
A Wells Fargo Company

REG-159704-03

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LEGAL PROCESSING DIVISION
PUBLICATION & REGULATIONS
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Benjamin R. Sears
Direct Line: (615) 665-5369
Email: Ben.Sears@bpsm.com

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By Overnight Delivery

CC:PA: LPD:PR (REG-159704-03)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224-0001

Re: Joint Board for the Enrollment of Actuaries Proposed Regulations on Performance of Actuarial Services Under the Employee Retirement Income Security Act of 1974 (REG-159704-03(74 Fed. Reg. 48,030, September 21, 2009))

Dear Sir or Madam:

Bryan, Pendleton, Swats & McAllister, LLC (BPS&M), Actuaries and Consultants, submits the following comments on the Joint Board for the Enrollment of Actuaries (JBEA) Proposed Regulations on the performance of actuarial services under the Employee Retirement Income Security Act of 1974 (Proposed Regulation under 20 C.F.R. part 901). BPS&M is an actuarial and employee benefits consulting firm employing Enrolled Actuaries and with offices in multiple locations. Enclosed are eight copies of these comments.

General Comments

We commend the JBEA for its efforts in the Proposed Regulations to modernize the rules for the performance of actuarial services under ERISA in relation to continuing professional education requirements for Enrolled Actuaries. However, we believe that the Proposed Regulations need clarification and additional guidance in several areas.

Specific Comments

We present below our specific comments and requests for clarification of certain portions of the Proposed Regulations. In submitting these comments, our particular interest is in the clarification of rules regarding the treatment of internal (in-house) qualifying programs sponsored by a qualified organization such as an actuarial firm which has multiple offices in

various locations and related matters concerning continuing professional education credit for Enrolled Actuaries.

1. Clarify what is needed for evaluation by the JBEA of the technical content and presentation of in-house programs to be qualifying programs.

Proposed Regulation Section 901.11(f)(2)(i)(F) requires that a qualifying program include "means for evaluation by the Joint Board of technical content and presentation." This appears to be a new requirement that is not in the existing regulations. It is not clear how this requirement is satisfied. For an in-house program, it is unclear whether it is sufficient to retain copies of the written outline or materials for a program or whether something additional is required, such as an audiotape or audiovideo recording of the actual presentation. Proposed Regulation Section 901.11(j)(1) provides limited guidance on recordkeeping requirements for qualified sponsors and does not address this specific matter.

We respectfully request that the regulations be revised to provide guidance on what is required for the JBEA to make its evaluation. We suggest that it should be sufficient to retain copies of the written outline and other written materials provided for the in-house program.

2. Clarify that teleconferencing programs do not require the physical presence of at least three individuals engaged in substantive pension service to be a qualifying program.

In the case of qualifying programs, Section 901.1(f)(2)(ii)(A) of the Proposed Regulations provides that a formal program must require the physical attendance of at least three individuals engaged in substantive pension service in addition to the instructor, discussion leader, or speaker. In the case of a qualifying program that is a teleconferencing program, Section 901.11(f)(2)(ii)(C) of the Proposed Regulations does not require the presence of at least three individuals engaged in substantive pension service at any site (originating site where speakers are or remote listening site) or at all sites in the aggregate. This is consistent with the Preamble to the Proposed Regulations which indicates that the three person requirement applies to formal programs only. See Preamble to Proposed Regulations, 74, Fed. Reg. 48,030, at p. 48,033 (September 21, 2009).

We respectfully request explicit clarification in the regulations that this three person requirement does not apply to teleconferencing programs.

3. Clarify whether the formal program provision that at least three individuals engaged in substantive pension service be physically present at the program requires that they all be Enrolled Actuaries.

In the case of qualifying programs, Section 901.11(f)(2)(ii)(A) of the Proposed Regulations provides that a formal program must require the physical attendance of at least three individuals engaged in substantive pension service in addition to the instructor, discussion leader, or speaker.

We respectfully request clarification whether these three individuals all must be Enrolled Actuaries.

4. Clarify application of formal program vs. teleconferencing program status to qualifying in-house programs which are attended in person at the originating office location and also teleconferenced to additional persons at remote office locations of the same firm which is the qualifying sponsor of the programs.

Section 901.11(f)(2)(ii) of the Proposed Regulations provides that types of qualifying programs include formal programs and teleconferencing programs, among others. Section 901.11(f)(1) of the Proposed Regulations requires (for an Enrolled Actuary) that “no less than 1/3 of the total hours of continuing education credit required for an enrollment cycle must be obtained by attending in person a formal program or programs within the meaning of [Section 901.11(f)(2)(ii)(A) of the Proposed Regulations].” We refer to this requirement as the “1/3 Rule” in the discussion below.

Issues are raised by both the distinction between formal and teleconferencing programs and this 1/3 Rule with respect to the case of an actuarial firm conducting a qualifying program in-house for its Enrolled Actuaries and other employees when the program is attended in person by some Enrolled Actuaries at the originating location where speakers are present but also attended by other Enrolled Actuaries by teleconference at other offices of the firm.

Assume a situation where the ABC actuarial firm (a qualifying sponsor with multiple offices) conducts a qualifying in-house program where the program is presented in a conference room at its Office 1 where the instructors are physically present and at least 3 Enrolled Actuaries employed by the ABC actuarial firm are also physically present attending the program. The program is teleconferenced in to Office 2 and Office 3 where some additional Enrolled Actuaries employed by the firm are also present and listening to the teleconference in the same room.

- **Issue A - Office 1 Formal Program Status: Is Office 1 participation treated as a formal program for purposes of the 1/3 Rule?**

With respect to the situation assumed above, at Office 1 the instructors and at least 3 Enrolled Actuaries engaged in substantive pension service are all physically present attending the program. At issue is whether, for purposes of the 1/3 Rule, the Office 1 program participation constitutes a formal program for those Enrolled Actuaries physically attending the program at Office 1 (assuming the requirements of Proposed Regulation Section 901.11(f)(2)(ii) for a formal program are met).

It appears that it should qualify as a formal program for this purpose. The fact that the program is also teleconferenced to other offices of ABC actuarial firm should not matter.

We respectfully request that this treatment of this type of situation be clarified in the regulations.

- **Issue B - Office 2 Teleconferencing Status: Is Office 2 teleconferencing participation by one Enrolled Actuary treated as a teleconferencing program for purposes of the 1/3 Rule?**

The next issue concerns Office 2 participation. With respect to the situation assumed above, if we assume that Office 2 has one Enrolled Actuary (engaged in substantive pension service) participating in the program by teleconference, it appears that his participation can qualify as a teleconferencing program with respect to him (assuming the requirements of Proposed Regulation Section 901.11(f)(2)(ii)(C) for a teleconferencing program are met). We understand this would not qualify as a formal program for this Enrolled Actuary under the 1/3 Rule because the Enrolled Actuary is not in physical attendance at Office 1.

We respectfully request that this treatment be clarified in the regulations.

- **Issue C - Office 3 Teleconferencing Program vs. Formal Program Status – Is Office 3 teleconferencing participation by three Enrolled Actuaries treated as a formal program or a teleconferencing program for purposes of the 1/3 Rule?**

The next issue concerns Office 3 participation. With respect to the situation assumed above, if we assume that Office 3 has three Enrolled Actuaries (engaged in substantive pension service) participating in the program by teleconference in the same room together in Office 3, an issue is whether their participation could qualify as a formal program with respect to the 1/3 Rule.

We assume that their participation would not qualify as a formal program because even though three Enrolled Actuaries are in attendance together in Office 3 on the teleconference, they did not physically attend in person the program at the Office 1 conference room where the instructors were physically present. For a formal program, Proposed Regulation Section 901.11(f)(2)(ii)(A) requires the physical attendance of at least three individuals engaged in substantive pension service “in addition to the instructor, discussion leader, or speaker.” However, it appears the participation of the three Enrolled Actuaries at Office 3 can qualify as a teleconferencing program with respect to each of those Enrolled Actuaries (assuming the requirements of Proposed Regulation Section 901.11(f)(2)(ii)(C) are met).

We respectfully request this treatment be clarified in the regulations.

5. **Clarify renewal cycle and renewal process for currently approved qualifying sponsors.**

The Preamble to the Proposed Regulations indicates that the Board proposes to delay the start date for the renewal cycle for qualifying sponsors by one year after the renewal cycle for Enrolled Actuaries in order to ease the administrative demands on the Executive Director and his staff, and to facilitate renewals by qualifying sponsors. Preamble to Proposed Regulations, 74 Federal Register 48,030, at p. 48,033 (September 21, 2009). Section 901.11(f)(3) of the Proposed Regulations provides that for sponsor agreements effective on or after January 1, 2008, and before January 1, 2012, the applicable sponsor enrollment cycle will end December 31, 2011.

For a qualifying sponsor of continuing professional educational programs that has a Confirmation of Renewal from the Joint Board for the Enrollment of Actuaries stating that that status has been renewed for the enrollment cycle January 1, 2008, through December 31, 2010, we understand that qualifying sponsor has an automatic extension of that renewal through December 31, 2011.

We respectfully request clarification in the regulations that this interpretation is correct and that no action is required by that qualifying sponsor to receive this extension of its status as a qualifying sponsor for this period. We also respectfully request guidance in the regulations on how that qualifying sponsor renews its qualifying status under the regulations for later periods.

Additional Information

If additional information on any of these comments would be helpful, please contact Ben Sears in our Nashville, Tennessee area office by telephone at (615) 665-1640, by email at ben.sears@bpsm.com, or by correspondence at 5301 Virginia Way, Suite 400, Brentwood, Tennessee 37027. Thank you for consideration of our comments.

Respectfully submitted,

Bryan, Pendleton, Swats & McAllister, LLC
By Benjamin R. Sears

BRYAN, PENDLETON, SWATS & MCALLISTER, LLC
By Benjamin R. Sears

Enclosures